No. 92-74

In the Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF REVENUE OF THE STATE OF OREGON,
PETITIONER

v.

ACF INDUSTRIES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Oregon ad valorem property tax discriminates against rail carriers, in violation of 49 U.S.C. 11503(b)(4), by exempting various types of commercial and industrial property other than railroad cars from the tax.

2. Whether, if the state tax violates 49 U.S.C. 11503 (b)(4), the appropriate remedy is to exempt railroad cars from the tax.

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INTEREST OF THE UNITED STATES

This case concerns Section 306 of the Railroad Revitalization a id Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (the 4-R Act). The United States has an interest in the proper application of this statute to preclude the imposition of discriminatory taxes on railroad property. At the Court's invitation, the United States filed a brief *amicus curiae* at the petition stage of this case.

STATUTORY PROVISIONS INVOLVED

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54, as originally codified at 49 U.S.C. 26c (1976) and as recodified in 1978 at 49 U.S.C. 11503 by the Revised Interstate Commerce Act, Pub. L. No. 95-473, § 1, 92 Stat. 1445, is reproduced at Pet. App. 35a-41a.

STATEMENT

1. The 4-R Act was enacted to improve the operations, structure, physical facilities, and financial stability of the

railway system of the United States. *Burlington Northern R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). Section 306 of that Act furthers "the goal of * * * railroad financial stability" by establishing "a prohibition on discriminatory state taxation of railroad property." 481 U.S. at 457. See also *Ogilvie* v. *State Board of Equalization*, 657 F.2d 204, 207 (8th Cir.), cert. denied, 454 U.S. 1086 (1981).[1] As recodified at 49 U.S.C. 11503,[2] Section 11503(b) declares that "[t]he following acts unreasonably burden and discriminate against interstate commerce" and provides that the States and their subdivisions "may not do any of them" (49 U.S.C. 11503(b)):

> (i) *Subsection (b)(1)*: the assessment of "rail transportation property"[3] at a higher ratio of its true market value than "other commercial and industrial property"[4] is assessed in the same jurisdiction (49 U.S.C. 11503(b)(1), derived from Section 306(1)(a) of the 4-R Act);[5]
>
> (ii) *Subsection (b)(2)*: the imposition of a tax based on such an improper assessment ratio (49 U.S.C. 11502(b)(2), derived from Section 306(1)(b) of the 4-R Act);
>
> (iii) *Subsection (b)(3)*: the imposition of an ad valorem property tax on "rail transportation property" at a tax rate higher than the rate applicable to "commercial and industrial property" in the same jurisdiction (49 U.S.C. 11503(b)(3), derived from Section 306(1)(c) of the 4-R Act); and
>
> (iv) *Subsection (b)(4)*: the imposition of "another tax that discriminates against a rail carrier" (49 U.S.C. 11503(b)(4), derived from Section 306(1)(d) of the 4-R Act).[6]

2. Oregon imposes an ad valorem tax on real and personal property located within the State (Pet. App. 5a). Various classes of personal property—such as agricultural machinery and equipment, business inventories, livestock, poultry, bees, and agricultural products in the possession of farmers—are exempt from the State's tax (Or. Rev.

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[1] As this Court stated in *Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969)):

> The legislative history of the antidiscrimination provision in the 4-R Act demonstrates Congress' awareness that interstate carriers "are easy prey for State and local tax assessors" in that they are "nonvoting, often nonresident, targets for local taxation," who cannot easily remove themselves from the locality.

Congress concluded in 1975 that, as the result of discriminatory state taxation, "railroads are over-taxed by at least $50 million each year." H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975).

[2] As this Court observed in *Burlington Northern R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454 (1987), although the statutory language of Section 306 was slightly altered upon its recodification in 1978, the Revised Interstate Commerce Act provides that the change in statutory language "may not be construed as making a substantive change in the laws replaced" (481 U.S. at 457 n.1, quoting Section 3(a) of the Revised Interstate Commerce Act, Pub. L. No. 95-473, 92 Stat. 1466). In this brief, for the reasons explained in *Kansas City Southern Ry.* v. *McNamara*, 817 F.2d 368, 370 n.2 (5th Cir. 1987), we will ordinarily refer to the current codification in describing the statute. Subsections (b)(1) through (b)(4) of the current codification correspond to Sections 306(1)(a) through 306(1)(d) of the 4-R Act (90 Stat. 54). 49 U.S.C. 11503.

[3] The term "rail transportation property" is defined to mean property "owned or used" by railroads. 49 U.S.C. 11503(a)(3).

[4] The term "commercial and industrial property" is defined to mean "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." 49 U.S.C. 11503(a)(4).

[5] The Act, however, contains an exception that allows the States to assess railroad property at a percentage of its true market value that is as much as 5% greater than the percentage that is applied to non-railroad property. This exception is contained in the provisions that authorize the federal courts to enjoin state violations of the Act. See 49 U.S.C. 11503(c).

[6] As originally enacted, Section 306(1)(d) of the 4-R Act proscribed "any other tax which results in discriminatory treatment of a common carrier by railroad" (Pet. App. 39a). In its recodification as Subsection (b)(4), the language was revised to proscribe "another tax that discriminates against a rail carrier" (49 U.S.C. 11503(b)(4)).

Stat. Ann. §§ 307.325, 307.400 (1992)). Some classes of personal property—such as motor vehicles—are exempt from the personal property tax but are subject to registration or other fees in lieu of the property tax (*id.* § 803.585 (1989)).[7] Railroad cars are classified as personal property and are not exempt from the State's tax (Pet. App. 5a).

Respondents are engaged in the business of leasing railroad cars to shippers and railroads (Pet. App. 22a).[8] Respondents filed this action in federal district court, seeking declaratory and injunctive relief against the assessment and collection of Oregon's personal property tax with respect to their railroad cars. Respondents claimed that, because of the exemptions available for various types of non-railroad commercial property, the state tax violates the prohibition of Subsection (b)(4) against "another tax that discriminates against a rail carrier" (49 U.S.C. 11503(b)(4)).

As a threshold question, the district court considered whether respondents had standing to raise a claim under this statute (Pet. App. 25a-28a). Respondents are car rental companies and are not themselves "rail carriers." Respondents contended, however, that a tax that discriminates against rail *cars* necessarily results in discrimination against rail *carriers* (*id.* at 25a).[9] The court held that, "given the undisputed close connections between [respondents] and the railroad industry," the link between discriminatory treatment of rail cars and rail carriers is sufficiently clear that respondents have standing to challenge the tax under Subsection (b)(4) (Pet. App. 27a-28a).

[7] Similarly, various classes of real property—such as standing timber—are exempt from the ad valorem real property tax and are, instead, taxed upon production or severance under a different tax scheme (see Or. Rev. Stat. Ann. § 321.272 (1993)).

[8] Some of respondents lease nearly all of their cars to shippers; others lease nearly all of their cars to railroads; others lease significant numbers of cars to both (Pet. App. 22a).

[9] The court noted that such an argument, pressed to its extreme, "could produce absurd results" (Pet. App. 27a). As the court stated, "[i]f any company that furnishes products to the railroad industry asserted standing under [Subsection (b)(4)], there would be almost no limit to standing" (Pet. App. 27a).

On the merits, the district court held that the state tax does not violate the nondiscrimination requirements of Subsection (b)(4). The court first noted (Pet. App. 28a) that Oregon assessed railroad property at the same percentage of its true market value as it assessed the other types of commercial property subject to tax, and thus did not violate Subsection (b)(1) or (b)(2). Oregon also did not apply a different tax rate in taxing railroad property than it applied in taxing non-railroad property, and thus did not violate Subsection (b)(3). See Pet. App. 28a.[10]

The court then addressed whether the State's scheme of tax exemptions discriminates against railroads in violation of Subsection (b)(4). The court noted that state property taxes that exempted more than 50% of non-railroad commercial property had been found to be impermissibly discriminatory under Subsection (b)(4) (Pet. App. 32a, citing *Trailer Train Co.* v. *Leuenberger*, 885 F.2d 415 (8th Cir. 1988), cert. denied, 490 U.S. 1066 (1989), and *Burlington Northern R.R.* v. *Bair*, 766 F.2d 1222 (8th Cir. 1985)). The court stated that, by contrast, the Oregon exemptions protected only about 30% of non-railroad commercial property from the state tax (Pet. App. 32a). The court concluded that, even if "there is some percentage level of exemption that would be impermissibly discriminatory I do not find such discrimination here" (*ibid.*).

[10] Under Subsections (b)(1) and (b)(3), only other property that is "subject to" property tax may be considered in determining whether an improper assessment ratio or tax rate is being applied to railroad property. See 49 U.S.C. 11503(a)(4); note 4, *supra*. While different assessment ratios and tax rates for railroad and non-railroad property would violate Subsections (b)(1) and (b)(3) (but see note 5, *supra*), the complete *exemption* of non-railroad property from tax does not violate those subsections because exempt property is not "subject to" tax and therefore does not fall within the statutory definition of "commercial and industrial property." See, *e.g.*, *Department of Revenue* v. *Trailer Train Co.*, 830 F.2d 1567, 1571, 1573 (11th Cir. 1987); notes 15, 24, *infra*.

3. The court of appeals reversed (Pet. App. 1a-19a). The court first held that respondents have standing to challenge the tax under Subsection (b)(4) because the statute "prohibits any tax that *results* in discriminatory treatment of a common carrier by railroad, even if the effect is indirect" (Pet. App. 7a n.2). See note 6, *supra*. The court noted that the State had "apparently abandoned" this issue on appeal (*ibid.*).[11]

On the merits, the court of appeals disagreed with the district court's conclusion that the exemption of a sizable percentage of non-railroad property under the State's tax scheme is permissible under Subsection (b)(4). In the court's view, "[t]he most natural reading" of the statute is that it "is violated by *any* exemption given to other taxpayers but not to railroads" (Pet. App. 16a). The court stated that, under the calculation most generous to the State, 25% of non-railroad commercial property is exempt from property tax (*id.* at 18a). The court held that that level of discrimination "far exceeds any possible *de minimis* exception" to Subsection (b)(4) and thus violates the nondiscrimination requirement of the statute (Pet. App. 19a).

In reaching that conclusion, the court of appeals rejected the State's claim that Subsection (b)(4) does not apply to ad valorem property taxes. The State argued that, since Subsections (b)(1) through (b)(3) establish specific rules for property taxes, and since Subsection (b)(4) by its terms proscribes discrimination resulting from "any other tax" (or, in the recodified version of the statute, "another tax"), the "other tax" referred to in Subsection (b)(4) must be a tax "other" than a property tax. The court rejected that claim because, as several

[11] Petitioner confirms that it no longer challenges respondents' standing under Subsection (b)(4). The petition states that the question of standing "may be considered settled for purposes of review at this level" (Pet. 5 n.5). Petitioner thus now concedes that, if the State's tax would violate Subsection (b)(4) with respect to rail cars owned by a rail carrier, the State's tax would likewise violate Subsection (b)(4) with respect to the rail cars owned by respondents.

other courts have held,[12] Subsections (b)(1) through (b)(3) do not address taxes that are discriminatory because of undue exemptions; by contrast, Subsection (b)(4) was enacted "to prevent tax discrimination * * * in *any form whatsoever*" (Pet. App. 12a, quoting *Ogilvie* v. *State Board of Equalization*, 657 F.2d at 210). Even though exemptions of non-railroad property are excluded from consideration in applying the per se rules of Subsections (b)(1) through (b)(3) to determine whether an improper assessment ratio or tax rate has been applied by the State (see note 10, *supra*), the court held (Pet. App. 12a-13a) that the existence of such exemptions is relevant in evaluating whether the state tax "discriminates against a rail carrier" in violation of Subsection (b)(4).

The court then addressed the proper remedy for the State's violation of Subsection (b)(4). The court rejected the State's view that respondents "are only entitled to an exemption for the percentage of their property corresponding to the percentage of all non-railroad property that is exempt" (Pet. App. 19a). The court held that respondents "were entitled to the same total exemption preferred property owners enjoyed" and directed the district court, on remand, to enjoin the State from collecting any portion of its tax on respondents' railroad property (*ibid.*).

SUMMARY OF ARGUMENT

1. Section 306 of the 4-R Act was enacted to end the long history of discriminatory state taxation of rail carriers and railroad property. Subsections (b)(1) through (b)(3) proscribe state property taxes that fail to apply equal assessment ratios and equal tax rates to railroad property and other commercial and industrial property. Subsection (b)(4) then generally prohibits the States from imposing "another tax that discriminates against a

[12] See *Department of Revenue* v. *Trailer Train Co.*, 830 F.2d at 1573; *Trailer Train Co.* v. *State Board of Equalization*, 710 F.2d 468, 472 (8th Cir. 1983); *Ogilvie* v. *State Board of Equalization*, 657 F.2d at 209-210. See also *Burlington Northern R.R.* v. *Bair*, 766 F.2d at 1224; *Trailer Train Co.* v. *Leuenberger*, 885 F.2d at 416-417.

rail carrier." The latter provision was enacted as a "catch all" to proscribe state tax discrimination "in all of its guises" (*Southern Ry.* v. *State Board of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983), cert. denied, 465 U.S. 1100 (1984)). It applies to discrimination implemented through property tax exemptions of non-railroad property as well as to other types of discriminatory state tax practices. Any other interpretation of the statute would require the assumption that Congress enacted an illogical and self-defeating scheme under which the States could discriminate against railroad property by the simple artifice of exempting all other types of property from the property tax base.

2. The court of appeals erred, however, in concluding that *any* state tax that affords different treatment to railroad property and some classes of non-railroad property necessarily violates Subsection (b)(4). The statute proscribes "discrimination" not "differentiation." A state tax that treats railroad and non-railroad property differently "discriminates against a rail carrier" only if the State cannot justify the differences in treatment. In this case, neither the district court nor the court of appeals considered whether the State of Oregon possesses valid justifications for the property tax exemptions that respondents have challenged. The case should be remanded for consideration of that issue in the first instance by the lower courts.

3. If, on remand, it is determined that some or all of the exemptions granted by the State lack justification and result in discrimination against rail carriers, the proper remedy is to exempt an equivalent percentage of railroad property from the State's tax. The remedy should place rail carriers in a position equivalent to that of the general mass of other commercial and industrial property in the State. A remedy thus tailored prevents the State from shifting a disproportionate share of its tax burden to railroads but does not deny the State all power to employ exemptions to implement state tax policies. The remedy adopted by the court of appeals—requiring a complete exemption of railroad property from the State's tax—is

not consistent wtih the substantive or remedial scheme that Congress adopted.

ARGUMENT

I. SUBSECTION (b)(4) PROHIBITS STATES FROM IMPOSING ANY TAX, INCLUDING AN AD VALOREM PROPERTY TAX, THAT DISCRIMINATES AGAINST RAIL CARRIERS

"It is a fact widely known, recognized by Congress, and not contested here by the parties that property taxation by the several states has, for many years, operated in a fashion inherently discriminatory against the railroads." *Clinchfield R.R.* v. *Lynch*, 700 F.2d 126, 128 (4th Cir. 1983). Section 306 of the 4-R Act was enacted in 1976 "to eliminate the long-standing burden on interstate commerce resulting from discriminatory State and local taxation of * * * transportation property" and to end "the discriminatory tax practices weakening our national transportation system" (S. Rep. No. 630, 91st Cong., 1st Sess. 1, 3 (1969)).[13]

Section 306 contains a four-part prohibition against discriminatory state taxation of railroads. The first three prohibitions (Subsections (b)(1) through (b)(3)) prevent the States from employing higher assessment or tax rates in taxing "rail transportation property" than in taxing "other commercial and industrial property" (49 U.S.C. 11503(b)(1)-(3)). The fourth prohibition (Subsection (b)(4)) prevents the States from imposing "another tax" (or, in the original phrasing of the statute, "any other tax") that "discriminates against a rail carrier" (49 U.S.C. 11503(b)(4)).

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[13] Before Section 306 was enacted, Congress considered several similar proposals to bar discriminatory taxation of rail carriers. See, *e.g.*, S. Rep. No. 445, 87th Cong., 1st Sess. 465 (1961); S. Rep. No. 1483, 90th Cong., 2d Sess. 9 (1968); S. Rep No. 630, *supra*, at 10; S. Rep. No. 1085, 92d Cong., 2d Sess. 2 (1972); H.R. Rep. No. 725, *supra*, at 78. The courts of appeals properly have considered the reports concerning these related proposals in determining Congress's intent in enacting Section 306. See, *e.g.*, *Arizona* v. *Atchison, T. & S.F. R.R.*, 656 F.2d 398, 404 n.6 (9th Cir. 1981).

The threshold question in this case is whether a state-granted property tax exemption for non-railroad property falls within the scope of any of these four non-discrimination requirements. Under the definitional provisions of the statute, the first three prohibitions (relating to improper assessment ratios and tax rates) require equal treatment only between railroad property and other "commercial and industrial property" that is "subject to a property tax levy" (49 U.S.C. 11503(a)(4)). Because Subsections (b)(1) through (b)(3) require equivalent tax treatment only for property that is "subject to" tax, the courts have consistently held that *exemptions* of non-railroad property from a state tax cannot violate those provisions. Exempt property is not "subject to tax," and the existence of exemptions is therefore irrelevant in applying the objective "equal assessment" and "equal tax rate" requirements of the first three subsections of the statute. *Clinchfield R.R.* v. *Lynch*, 784 F.2d 545, 553 (4th Cir. 1986); note 10, *supra*.[14]

[14] The conclusion that Subsections (b)(1) through (b)(3) have no application to property tax exemptions is not challenged by respondents. The issue was not addressed by the parties below and is not presented as a question for review in this Court.

In *Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123 (1987), this Court noted probable jurisdiction of an appeal that raised the question whether the analogous statutory definition in the Airport and Airway Improvement Act of 1982 of commercial and industrial property "subject to" tax (49 U.S.C. App. 1513 (d)(1)) omits or includes property exempt from the tax. See 480 U.S. at 127-129. The Court found it unnecessary to resolve that question in *Western Air Lines* because a different provision of that Act, which has no parallel in the 4-R Act, required the conclusion that the state tax was valid without regard to the correct meaning of that provision. See 480 U.S. at 129-134.

Both before and after the Court declined to reach this issue in *Western Air Lines*, other courts have consistently held that exempt property is not "subject to" tax and that Subsections (b)(1) through (b)(3) of Section 306 of the 4-R Act therefore have no application to property tax exemptions. See Pet. App. 8a; note 10, *supra*. But cf. *Northwest Airlines, Inc.* v. *State Board of Equalization*, 358 N.W.2d 515 (N.D. 1984). Congress expressly contemplated that the States would not be precluded by Subsections (b)(1) through (b)(3) from exempting some types of property from tax

The potentially discriminatory effect of property tax exemptions for non-railroad property therefore must be evaluated (if at all) under the standards of Subsection (b)(4), which proscribes "another tax that discriminates against a rail carrier" (49 U.S.C. 11503(b)(4)). The court of appeals correctly held in this case (Pet. App. 12a) that, under Subsection (b)(4), the States are precluded from employing property tax exemptions in a manner that results in discrimination against rail carriers.[15] This interpretation of Subsection (b)(4) is the "interpretation which can most fairly be said to be [e]mbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested" (*FBI* v. *Abramson*, 456 U.S. 615, 625 n.7 (1982), quoting *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part)).

1. To end tax discrimination against rail carriers, Congress specifically forbade the States from imposing an assessment ratio or tax rate for railroad property that exceeds the assessment ratio or tax rate applicable for "other commercial or industrial property" (49 U.S.C. 11503(b)(1)-(3)). Petitioner contends that these objective limitations in Subsections (b)(1) through (b)(3) exhausted Congress's concerns with discriminatory state property taxes and that the prohibition of "another tax" that discriminates against rail carriers in Subsection (b)(4) must be understood to refer only to a tax "other

(see S. Rep. No. 630, *supra*, at 11). The statute itself exempts "land used primarily for agricultural purposes or timber growing" from the comparison class for evaluating discriminatory assessment ratios and tax rates under Subsections (b)(1) through (b)(3). See 49 U.S.C. 11503(a)(4); note 24, *infra*.

[15] The other courts of appeals have consistently reached this same conclusion. See note 12, *supra*. In *Richmond, F. & P. R.R.* v. *State Corp. Comm'n*, 336 S.E.2d 896, 897 (1985), however, the Supreme Court of Virginia held (without extended discussion or analysis) that Subsection (b)(4) "does not refer to *ad valorem* property taxes at all, but rather refers to other or different schemes of taxation not contemplated by the first three subparagraphs."

than" a property tax. The language, purpose and history of the statute are inconsistent with petitioner's claim.

Subsections (b)(1) through (b)(3) contain objective tests proscribing certain types of unequal tax treatment of "railroad property." Subsection (b)(4) contains a general prohibition of "another tax" which "discriminates" against rail carriers. Both the nature of the prohibition ("discrimination") and the description of the protected class ("rail carriers") is broader and more general in the latter provision than in the former. The broad language of Subsection (b)(4) reflects that it was enacted as a "catch-all" provision to reach discriminatory state taxation "in all of its guises."[16] *Southern Ry.* v. *State Board of Equalization*, 715 F.2d at 528. As explained by the Eleventh Circuit:

> Following three subparagraphs * * * dealing with taxation of "transportation property," [Subsection (b)(4)] then forbids "the imposition of *any other tax* which results in discriminatory treatment of a common carrier by railroad." Without invoking any of the ordinary rules of construction, it would appear that [Subsection (b)(4)] is indeed intended as a catchall provision to prevent discriminatory taxation of a railroad carrier by any means.

Alabama Great Southern R.R. v. *Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981). See also *Richmond, F. & P. R.R.* v. *Department of Taxation*, 762 F.2d at 379. Thus, in the statute's broad design, Subsection (b)(4)

[16] Senate Bill 927, proposed in 1967, included language similar to the language now codified in Subsections (b)(1) through (b)(3). 4 *Hearings on S. 927 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 90th Cong., 1st Sess. 1-2 (1967). Language similar to Subsection (b)(4) was first presented in H.R. 12891, in 1974. 16 *Hearings Before the House Committee on Interstate and Foreign Commerce and the Subcommittee on Transportation and Aeronautics*, 93d Cong., 2d Sess. 24 (1974). As the Fourth Circuit has noted, "nothing in the committee reports, debates, or other legislative history focuses specifically on the purpose of [Subsection (b)(4)]" (*Richmond, F. & P. R.R.* v. *Department of Taxation*, 762 F.2d 375, 379 (1985)).

prohibits tax discrimination against "rail carriers" in any form and by any method. See, *e.g.*, *Burlington Northern R.R.* v. *City of Superior*, 932 F.2d 1185, 1187 (7th Cir. 1991) (occupation tax); *Department of Revenue* v. *Trailer Train Co.*, 830 F.2d at 1573 (property tax exemptions); *Kansas City Southern Ry.* v. *McNamara*, 817 F.2d at 372-373 (gross receipts tax); *Richmond, F. & P. R.R.* v. *Department of Taxation*, 762 F.2d at 376 (income taxes); *Ogilvie* v. *State Board of Equalization*, 657 F.2d at 209-210 (property tax exemptions).

Congress was, of course, aware that the States had long discriminated against rail carriers through application of general property tax regimes in the manner now proscribed in Subsections (b)(1) through (b)(3). Congress also recognized that there were other ways in which state taxes could discriminate against, and unreasonably burden, interstate commerce. Rather than attempting the impractical task of anticipating every tax scheme that could result in unjust discrimination against rail carriers, Congress employed the broad prohibition against discrimination in Subsection (b)(4) to account for the "unforeseeable" (*Diamond* v. *Chakrabarty*, 447 U.S. 303, 316 (1980)). Cf. *United States* v. *Pennsylvania R.R.*, 323 U.S. 612, 616 (1945) (although "Congress has specified with precise language some obligations[.] * * * [t]he very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms"); *United States* v. *Baltimore & O. R.R.*, 333 U.S. 169, 175 (1948).

The history of Subsection (b)(4) supports the conclusion that the statute is designed to proscribe all forms of discriminatory state taxation. The House bill from which Subsection (b)(4) is derived would have limited this provision to discriminatory "in lieu" taxes imposed as an alternative to ad valorem property taxes. H.R. Conf. Rep. No. 768, 94th Cong., 1st Sess. 139 (1975); H.R. Rep. No. 725, *supra*, at 77. In the conference agreement, the provision was expanded to proscribe discrimination under "any other tax." S. Conf. Rep. No. 595, 94th Cong., 2d

Sess. 165-166 (1976). In selecting this broader statutory language, Congress sought to proscribe all forms and methods of state taxation that "result[] in discriminatory treatment" of rail carriers (Pet. App. 39a).[37]

2. If Subsection (b)(4) were interpreted to apply only to taxes *other than* property taxes, the statute would fall far short of its goal of ending discriminatory state taxation. Under Subsections (b)(1) through (b)(3), only commercial and industrial property that is "subject to" the property tax is to be considered in determining whether an improper assessment ratio or tax rate has been applied to railroad property. These provisions have no mechanism for taking into account the potentially discriminatory effect of an expansive scheme of tax exemptions for non-railroad property. See note 5, *supra*; note 24, *infra*. If the general prohibition against state tax discrimination in Subsection (b)(4) did not apply to property taxes, the States would be able to renew their historical discrimination against railroads by adopting a broad set of tax exemptions for non-railroad property, thereby shifting a disproportionate share of the property tax burden to rail carriers. The history of litigation under the 4-R Act reveals that this concern is not fanciful.

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[37] This understanding of the statute does not require the conclusion that the broad nondiscrimination clause of Subsection (b)(4) nullifies the specific, objective tests of Subsections (b)(1) through (b)(3). Subsections (b)(1) through (b)(3) bar the States from imposing higher assessment ratios and tax rates for railroad property than for non-railroad property. Under the *per se* tests of these Subsections, a court need not consider whether such differential treatment of railroad property otherwise constitutes "discrimination." These provisions impose an objective test. The use of differential rates for assessing or taxing railroad and non-railroad property is unlawful without further inquiry. *See Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. at 464. By contrast, Subsection (b)(4) applies only when the court finds that the state tax results in "discrimination" against rail carriers. See 49 U.S.C. 11503(b)(4). See pages 16-24, *infra*. That there may be some overlap among the various subsections is not surprising given the breadth of the statutory goal. *See Connecticut National Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992).

For example, in *Burlington Northern R.R. v. Bair*, 766 F.2d at 1223, Iowa "assessed * * * *ad valorem* tax payments on [railroad] personal property in the state while effectively exempting the personal property of most other taxpayers." The State exempted "ninety-five percent of personal property owners from taxation." *Id.* at 1224. In concluding that this discriminatory exemption scheme violates the statute, the court rejected the State's claim that Subsection (b)(4) "applies only to taxes other than property taxes" (766 F.2d at 1224):

> In our judgment, [Subsection (b)(1)] covers claims of unequal valuation ratios between railroad and other commercial and industrial property, but not classification discrimination such as is presented here. [Subsection (b)(4)] is a broad provision intended to reach all types of discriminatory tax treatment.

Other States also have employed broad exemption schemes to place discriminatory tax burdens on rail carriers. See, *e.g.*, *Trailer Train Co. v. Leuenberger*, 885 F.2d at 416 ("75.75% of commercial and industrial personal property is exempt from taxation in Nebraska"). As the Fourth Circuit explained in *Clinchfield R.R. v. Lynch*, 784 F.2d at 552, the problem with such exemptions

> is that if states are allowed to grant tax reductions to an increasing number of property items without taking into account the effect on the taxation of railroad property, the antidiscriminatory spirit and intent of § 306 would soon be swallowed up in the exceptions.

Accord *Trailer Train Co. v. Leuenberger*, 885 F.2d at 418.

To prevent the States from a wholesale shifting of the burden of property taxes to railroads, the potentially discriminatory effect of property tax exemptions must be considered under Subsection (b)(4). Any other interpretation of the statute requires the illogical assumption that Congress enacted a self-defeating scheme that permits the States to discriminate against rail carriers by the simple

artifice of exempting all other property owners from their property tax base. The court of appeals correctly held (Pet. App. 13a-16a) that, in enacting the "catch-all" provisions of Subsection (b)(4), Congress did not sanction such facile evasion of the nondiscrimination requirements of the statute.

II. THE MERE EXISTENCE OF DIFFERENCES BETWEEN STATE TAX TREATMENT OF RAILROAD AND SPECIFIED CLASSES OF NON-RAILROAD PROPERTY DOES NOT ALONE CONSTITUTE DISCRIMINATION UNDER SUBSECTION (b)(4) OF THE 4-R ACT

Unlike Subsections (b)(1) through (b)(3), which provide objective criteria for identifying specific types of proscribed unequal tax treatment of railroad property, Subsection (b)(4) provides no clear guidance for determining what constitutes prohibited "discriminat[ion] against a rail carrier" (49 U.S.C. 11503(b)(4)). The text of Subsection (b)(4) does not identify any specific or quantitative test. In this context, the court of appeals stated that "[t]he most natural reading" of the statute is that it "is violated by *any* exemption given to other taxpayers but not to railroads" (Pet. App. 16a). The court held that any such difference in the tax treatment of railroad and non-railroad property "violates the statute" (*id. at* 17a).[18]

This interpretation of the statute is not correct. The court's holding fails to give the terms of the statute their ordinary meaning and cannot be reconciled with the structure and purpose of the Act.

1. a. It is well established that "the words of statutes * * * should be interpreted where possible in their ordinary, everyday senses" (*Malat* v. *Riddell*, 383 U.S. 569, 571 (1966) (quoting *Crane* v. *Commissioner*, 331 U.S.

[18] The court stated, as a "possible qualification" to its broad holding, "that a *de minimis* level of exemption available only to other taxpayers may not state a claim under [Subsection (b)(4)]" (Pet. App. 17a). See note 5, *supra*.

1, 6 (1947))). The ordinary meaning of the word "discriminate" is the "failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored." *Richmond, F. & P. R.R.* v. *Department of Taxation*, 762 F.2d at 380 n.4 (quoting *Baker* v. *California Land Title Co.*, 349 F. Supp. 235, 238 (C.D. Cal. 1972), aff'd, 507 F.2d 895 (9th Cir. 1974), cert. denied, 422 U.S. 1046 (1975)). Accord *Department of Revenue* v *Trailer Train Co.*, 830 F.2d at 1574. The dictionary defines the word "discriminate" to mean "to make a distinction in favor of or against a person or thing on the basis of the group, class, or category to which the person or thing belongs *rather than according to actual merit.*" *Random House Dictionary* 564 (unabridged 2d ed. 1987) (emphasis added). Economic "discrimination" does not exist simply because two classes are treated *differently*. It exists when they are treated differently without an acceptable justification.

The Court has recognized this common meaning of economic "discrimination" in a variety of regulatory statutes. For example, under transportation statutes that prohibit common carriers from discriminating in rates, the Court has held that the mere fact that "differential treatment" exists does not alone establish discrimination.[20] Instead, discrimination exists only if "it also appears that [the] differential treatment is not justified by differences in [the] operating conditions that substantially affect the allegedly discriminating carrier." *Western Pacific R.R.* v. *United States*, 382 U.S. 237, 246 (1965). See also *United States* v. *Illinois Central R.R.*, 263 U.S. 515, 521 (1924); *Providence & W. R.R.* v. *United States*, 666 F.2d 736, 740 (1st Cir. 1981) ("a carrier may prefer one line over another if the preference is justified by differences in conditions").[21]

[20] These cases arose under former Section 3(4) of the Interstate Commerce Act, which provided that common carriers "shall not discriminate in their rates, fares, and charges between connecting lines" (49 U.S.C. 3(4) (1964)).

[21] Section 306 drew its origin from these statutes regulating common carriers. The introductory clause of Section 306 proscribes

Similarly, in cases involving intergovernmental tax immunity, the fact that a state tax treats those who deal with the federal government differently from others does not alone establish discrimination. The existence of economic discrimination in this context, as elsewhere, turns on whether the differences in treatment can be justified by "significant differences between the two classes." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 815-816 (1989). Accord *Washington* v. *United States*, 460 U.S. 536, 542 (1983); *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376, 382 (1960).

The fact that a state tax affords different treatment to railroad property than to non-railroad property thus does not alone estabilsh that "discrimination" has occurred. It does, however, establish a prima facie case of discrimination that the State must rebut by an adequate demonstration of its justification for the different treatment. See *Kansas City Southern Ry.* v. *McNamara*, 817 F.2d at 376 ("[i]n a 4-R case, the railroads need only establish that the tax is facially discriminatory, after which the tax must be justified, if possible, by the state").[22]

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acts that constitute "an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce" (Pet. App. 39a). This phrasing is derived from former Section 13(4) of the Interstate Commerce Act, which proscribed action by a State that constituted an "unreasonable, or unjust discrimination against, or an undue burden on, interstate or foreign commerce" (49 U.S.C. 13(4) (1964)). See S. Rep. No. 1483, *supra*, at 9.

[22] *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141 (1979), is not to the contrary. *Snead* involved Section 2121(a) of the Tax Reform Act of 1976, which proscribed any state "tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers * * * or consumers of that electricity" (15 U.S.C. 391). The Court concluded that it was unnecesary to consider the State's contention that other features of the State's tax law might counterbalance its discriminatory state energy tax, because "the federal statutory provision is directed specifically at a state tax 'on or with respect to the generation or transmission of electricity,' not to the entire tax structure of the State." 441 U.S. at 149. By contrast, the statute involved in this case broadly proscribes any state tax that "discriminates against a

b. That Congress did not intend the word "discriminate" to have a broader sweep in Subsection (b)(4) than it has in other similar contexts is confirmed by the language and structure of the Act, as well as by its legislative history. The 4-R Act was not designed to deprive the States of all latitude in determining what property may be subject to tax and how various classes of property are taxed. For example, a property tax violates Subsections (b)(1) through (b)(3) only if the assessment ratio or tax rate applied to property of the railroad is higher than the "average" assessment ratio or tax rate applicable to the comparison class as a whole. *Arizona* v. *Atchison, T. & S.F. R.R.*, 656 F.2d at 404; *General American Transportation Corp.* v. *Kentucky*, 791 F.2d 38, 42 (6th Cir 1986).[23] Even then, relief may not be granted unless the assessment ratio applicable to railroad property exceeds the assessment ratio applicable to all other "commercial and industrial property" by five percent or more. 49 U.S.C. 11503(c). Under the decision in this case, however, if *any* class of property receives a more favorable assessment ratio or tax rate, the tax, although valid under Subsections (b)(1) through (b)(3), would necessarily fail under Subsection (b)(4).

The statutory definition of "commercial and industrial property"—which is used as a comparison basis for purposes of Subsections (b)(1) through (b)(3)—further reflects that Congress did not require the States to tax railroad property on the most favorable basis granted to *any* class of property. "[L]and used primarily for agricultural purposes or timber growing" is specifically excepted from the class of "commercial and industrial property" used for this comparison purpose. See 49 U.S.C. 11503 (a)(4). Under the analysis of the court of appeals, how-

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rail carrier" (49 U.S.C. 11503(b)(4)) and is not limited to any particular type or method of state taxation.

[23] See S. Rep. No. 630, *supra*, at 10 ("To make the fairest comparison—that of the carrier with the hypothetical 'average' taxpayer—the committee intends that the unit to be used is that of all parcels of property in the district, considered in the aggregate").

ever, a property tax framed in the manner permitted under Subsections (b)(1) through (b)(3)—and imposed equally on all classes of property other than "land used primarily for agricultural purposes or timber growing"—would fail under Subsection (b)(4) simply because that exemption was "given to other taxpayers but not to railroads" (Pet. App. 16a).

The statutory definition of "commercial and industrial property" is also limited to property that is in fact "subject to a property tax levy" (49 U.S.C. 11503(a)(4)). The legislative history confirms, as the language of the statute suggests, that this definition was crafted to exclude exempt property from the comparison base under Subsections (b)(1) through (b)(3).[24] A law review article by the Oregon Assistant Attorney General suggests that the provisions of the statute that delete exempt property from the comparison class under Subsections (b)(1) through (b)(3) "would be rendered superfluous if property tax exemptions are found discriminatory" under Subsection (b)(4). J. Laronge, *Property Tax Exemptions Under Section 306 of the 4-R Act*, 26 Willamette L. Rev. 635, 653 (1990). The fact that property tax exemptions violate Subsection (b)(4) when they lack a valid justification, however, does not require the conclusion that *all* exemptions lack such a justification and are proscribed by the statute. See pages 21-24, *infra*. Only by concluding, as the court of appeals did in this case, that *any* difference in treatment of railroad and non-railroad property

[24] Congress enacted this restriction in response to lobbying by the States to avoid consideration of exempt property under the "equal assessment" and "equal tax" rate requirements of Subsections (b)(1) through (b)(3). See 4 *Hearings on S. 927 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 90th Cong., 1st Sess. 116 (1967) (Oregon State Tax Comm.); 6 *Hearing Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 91st Cong., 1st Sess. 83, 86-87 (1969) (Western States Assoc. of Tax Administrators); 9 *Hearing Before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 89-90 (1970) (California Bd. of Equalization).

violates Subsection (b)(4) is the omission of exempt property from consideration under the objective tests of Subsections (b)(1) through (b)(3) made superfluous.[25]

2. a. Once disparate state tax treatment of rail carriers is established, the remaining inquiry under Subsection (b)(4) is the validity of the justifications offered by the State. The proffered justifications will, of course, vary with the nature and scope of the different treatment involved. For this reason, it is impractical and unnecessary for the Court to attempt in this case to delineate what would constitute sufficient justification for all of the varied forms of differential tax treatment in which the States may engage. Nonetheless, as a general principle, the inquiry into the validity of specific proffered justifications should be guided in each case by the statute's goal of preventing the States from imposing a disproportionate share of tax burdens upon rail carirers.

For example, any state taxing scheme that has the design or effect of singling railroads out for substantially harsher treatment than meted out to other property owners would not be justifiable. See *Burlington Northern R.R.* v. *City of Superior*, 932 F.2d at 1188. A scheme that taxes railroad property but exempts all or most non-railroad property within the State falls within the core of "discrimination" that Subsection (b)(4) proscribes. See, *e.g.*, *Trailer Train Co.* v. *Leuenberger*, 885 F.2d at 418 (property tax that exempts 75% of non-railroad property violates Subsection (b)(4)).

On the other hand, a State may be able in a particular case to justify a specific tax exemption by showing that

[25] The Conference Committee deleted a Senate amendment that would have made the statute inapplicable "in any State which, on the date of enactment of this section, ha[d] in effect a provision of its constitution (or an amendment thereto) which provides for the reasonable classification of property for State purposes" (S. Rep. No. 499, 94th Cong., 1st Sess. 233 (1975)). See S. Conf. Rep. No. 595, *supra*, at 166. The fact that Congress declined to give the States a blanket approval for property tax exemptions confirms that the States retain the burden of justifying differential tax treatment under Subsection (b)(4).

the exempt property is subject to alternative state or local taxes that are not levied against railroads.[26] For example, an exemption of motor vehicles from a state property tax may be justified if the vehicles are subject to alternative tax and licensing fees. See Or. Rev. Stat. Ann. § 803.585 (1989). If the owners of such property bear a comparable share of the State's tax burden *on property*, it could not be said that a disproportionate share of that tax burden has been shifted to rail carriers.[27]

We agree, however, with the courts that have held that an economic study of the entire burden of all forms of state taxation on railroad and non-railroad property is not required to determine whether discrimination has occurred under Subsection (b)(4).[28] A State's exemption of business inventories (see pages 3-4, *supra*) thus could not be justified on the ground that such inventories may be expected to generate additional sales, use or income taxes. Railroad property also generates, through its use, additional sales and income taxes. A property tax exemption not available to railroad property "discriminates against a

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[26] In *Burlington Northern R.R.* v. *City of Superior*, 932 F.2d 1185 (7th Cir. 1991), the court held that taxes that are narrowly drawn to apply solely or primarily to activities in which only railroads engage must be set aside under Subsection (b)(4) without regard to whether the State might impose *other* taxes on comparable activities of other taxpayers. The court acknowledged, however, that a State may be able to defend a tax that is imposed on an activity in which railroads are not the sole actors. 932 F.2d at 1188.

[27] Petitioner has taken the position that certain of the State's exemptions (for motor vehicles and standing timber) may be justified on the basis that such property is subject to alternative taxing schemes. See note 7, *supra*. Neither the district court nor the court of appeals addressed those claims. Absent findings on this issue, we express no opinion as to whether the State's alternative taxing schemes provide a sufficient justification for the exemptions challenged in this case.

[28] See, *e.g.*, *Trailer Train Co.* v. *State Tax Comm'n*, 929 F.2d 1300, 1302-1303 (8th Cir.) (an "in-depth examination of [the State's] complete tax structure" is not required to evaluate a claim of discrimination under Subsection (b)(4)), cert. denied, 112 S. Ct. 169 (1991); *Kansas City Southern Ry.* v. *McNamara*, 817 F.2d at 375 (same).

rail carrier" if the alternative taxes to which the exempt property is subject are not a substitute for the property tax or if rail carriers are also subject to those alternative taxes.[29]

We therefore disagree with the conclusion of the district court that exemptions do not "discriminate against a rail carrier" merely because the favored classes comprise less than 30% of the aggregate value of the commercial and industrial property in the State (Pet. App. 32a). A state tax exemption that serves no purpose other than to grant favorable treatment to a substantial segment of local property owners cannot be justified under Subsection (b)(4). It is true, of course, that Congress did not intend to require precise uniformity in the treatment of railroad and non-railroad property. Subsection (c) contains an express exception for property tax assessments that impose no greater than a five percent discriminatory disadvantage on railroad property. See 49 U.S.C. 11503 (c); Pet. App. 17a. Although this provision does not, by its terms, apply to the discrimination proscribed by Subsection (b)(4), it would be incongruous to conclude either (i) that discrimination that falls *below* this express statutory threshold should nonetheless come within the ambit of the more general provisions of Subsection (b)(4) or (ii) that discrimination that *exceeds* the express statutory threshold should *not* come within the general proscription against discrimination in that Subsection. The limited leeway that Congress gave the States in shaping

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[29] The fact that Congress removed "land used primarily for agricultural puposes or timber growing" from the statutory definition of "commercial and industrial property" (49 U.S.C. 11503(a)(4)) indicates that Congress intended to allow the States to treat such property on a more favorable basis without running afoul of the Act. Similarly, charitable and educational property ordinarily would not fall within the concept of "commercial and industrial property," and exemptions favoring such property would therefore be permissible. But Congress identified no other class of property for which favorable treatment is presumptively allowed. The burden thus remains with the States to justify favorable treatment for any other types of non-railroad property.

property tax policies is as appropriate under Subsection (b)(4) as it is under the objective criteria of the preceding subsections. Congress did not insulate railroads completely from state tax policies, and also did not give the States a free hand to impose meaningfully greater tax burden on railroads than on the general mass of other property owners.

b. Neither the district court nor the court of appeals considered or determined which of the exemptions involved in this case would—and which would not—constitute an unjustified "discrimination" under the particularized analysis that the statute requires. This case should therefore be remanded to the lower courts for their consideration of these underlying factual issues in the first instance.

III. THE REMEDY FOR A VIOLATION OF SUBSECTION (b)(4) SHOULD BE DESIGNED TO PROVIDE EQUIVALENT TAX TREATMENT FOR RAILROAD AND NON-RAILROAD PROPERTY

The court of appeals concluded that the exemptions challenged in this case discriminate against rail carriers. The court held that the proper remedy for this violation of Subsection (b)(4) is "the same total exemption [for rail carriers that] preferred property owners enjoyed" (Pet. App. 19a). The court therefore directed the district court to enjoin the State's "collection of the ad valorem tax" on all property that respondents own (*ibid.*).

The extreme remedy selected by the court of appeals no doubt serves to eliminate any observed discrimination against rail carriers. The sweeping breadth of this remedy, however, is not consistent with the remedial provisions of the Act, which seek to achieve equivalent—not preferential—tax treatment for rail carriers.

1. A preliminary question exists as to the power of the federal courts to award *any* injunctive relief for violations of Subsection (b)(4). 28 U.S.C. 1341 generally bars federal courts from enjoining "the assessment, levy or collection of any tax under State law where a plain,

speedy and efficient remedy may be had in the courts of such State." Even when a state tax is claimed to violate the Constitution or a federal statute, 28 U.S.C. 1341 deprives federal courts of jurisdiction to enjoin the tax so long as state tax refund procedures provide an adequate opportunity for the taxpayer's claim to be raised and considered. See *Franchise Tax Board* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 338, 341 (1990); *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 622-623 (1946); *Bland* v. *McHann*, 463 F.2d 21, 24-25 (5th Cir. 1972), cert. denied, 410 U.S. 966 (1973).

Congress was aware of this general obstacle to federal court jurisdiction and therefore provided in Section 306(2) of the 4-R Act (Pet. App. 39a-40a):[20]

> Notwithstanding any provision of section 1341 of title 28, United States Code, or of the [c]onstitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain[,] or terminate any acts in violation of this section, except that—
>
> (a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection; [and]
>
> * * * * *
>
> (c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to [railroad] property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction.
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> * * * * *

[20] The recodified version of the statute is not materially different. See 49 U.S.C. 11503(c).

The introductory clause of this provision removes the bar of 28 U.S.C. 1341 from suits to enjoin "any acts in violation" of this statute. The succeeding two clauses, however, (i) preserve concurrent state court jurisdiction over such claims and (ii) permit "no relief" to be granted under the statute "unless" the assessment ratio on railroad property is at least five percent higher than the assessment rate for other commercial and industrial property.

On its face, this provision seems "oddly cast" (*Kansas City Southern Ry.* v. *McNamara*, 817 F.2d at 371) and "presents a sticky exercise in statutory interpretation" (*Trailer Train Co.* v. *State Board of Equalization*, 697 F.2d 860, 865 (9th Cir.), cert. denied, 464 U.S. 846 (1983)). The statute could be read to permit injunctive relief in federal courts only for violations of the "equal assessment ratio" requirements of Subsections (b)(1) and (b)(2) and to remit rail carriers to state court tax refund procedures for challenges based upon the "equal tax rate" and general nondiscrimination requirements of Subsections (b)(3) and (b)(4).[21] The courts that have addressed this question, however, have consistently concluded that the statute should not be understood to require that result. See *Kansas City Southern Ry* v. *McNamara*, 817 F.2d at 371; *Trailer Train Co.* v. *State Board of Equalization*, 697 F.2d at 865-866.

The statute directly empowers the federal courts to award such injunctive relief "as may be necessary to prevent, restrain[,] or terminate *any acts* in violation of" Section 306 (Pet. App. 40a (emphasis added)). The subsequent clause—which precludes the award of relief unless assessment-ratio discrimination in excess of five percent is present—can only rationally be understood as a limit on the availability of relief *for* assessment-ratio discrimination. Any other interpretation would strip all plausible meaning from the language that authorizes federal courts to enjoin "any acts" in violation of the statute. *Trailer Train Co.* v. *State Board of Equalization*, 697 F.2d at 866.

[21] The potential relevance of this provision to this case was not raised or considered below. Since the issue it presents relates to subject matter jurisdiction, it is proper for it to be addressed at this time.

As this Court held in *Philbrook* v. *Glodgett*, 421 U.S. 707 (1975), a statute must be interpreted by considering "the provisions of the whole law, and * * * its object and policy" (*id.* at 713). To give meaning to the authority provided to enjoin "any acts" in violation of Section 306 (Pet. App. 40a), and to accomplish the statute's object of proscribing all forms of discriminatory state taxation of railroads, the courts have consistently and properly held that "[f]ederal courts have jurisdiction over a case alleging discriminatory taxation in violation of [Subsections (b)(3) and (b)(4)]." *Kansas City Southern Ry.* v. *McNamara*, 817 F.2d at 371.

2. In cases involving constitutional challenges to a state tax, the Court has held that a federal court should not "decree a valid tax for the invalid one which the State had attempted to exact." *Moses Lake Homes, Inc.* v. *Grant County*, 365 U.S. 744, 752 (1961). When the tax is found to conflict with the Constitution, the proper decree is that "it 'may not be exacted.'" *Ibid.* (quoting *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. at 387). The remedy adopted by the court of appeals in this case could be said to be consistent with that remedial principle.

In enacting the 4-R Act, however, Congress concluded that the remedial approach of *Moses Lake* should not apply. The jurisdictional provisions of the statute authorize injunctive relief only to the extent "necessary to prevent, restrain[,] or terminate any acts in violation of this section" (Pet. App. 39a-40a). Congress considered and rejected the suggestion that the remedial model of *Moses Lake* should apply under the 4-R Act and that injunctive relief under the Act "should deal with the tax in its entirety rather than with so much of the tax as is discriminatory" (S. Rep. No. 630, *supra*, at 13):

> Such a provision could cause economic hardship and inconvenience upon States and localities that might

> be affected. There is no need for a Federal court to enjoin the tax in its entirety, only the discriminatory portion.

See also S. Rep. No. 1483, *supra*, at 12 ("There is no need for a Federal court to enjoin the tax in its entirety, only the discriminatory portion").[32] For this reason, Congress authorized injunctive relief under the 4-R Act only from "the excessive portion of a State or local transportation property tax." S. Rep. No. 630, *supra*, at 11.

The remedy that is "necessary" to prevent the discrimination proscribed by Subsection (b)(4) is an injunction that bars the States from imposing an unequal or disproportionate share of the burden of the challenged tax on railroads. The object of the statute is not to obtain for rail carriers the most preferential tax treatment available. It is to obtain for rail carriers equivalent treatment with the general mass of other taxpayers. See pages 16-24, *supra*. To accomplish such treatment, it is unnecessary for the courts to enjoin application of the State's "entire rate or assessment scheme."[33] *Kansas City Southern Ry.* v. *McNamara*, 817 F.2d at 378. See *Burlington Northern R.R.* v. *Bair*, 766 F.2d at 1224. The broad remedy adopted by the court of appeals in this case conflicts with the narrower remedial language that Congress employed.

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[32] See also H.R. Rep. No. 725, supra, at 78 ("Federal courts will be able to devise remedies that will not be burdensome to the communities involved").

[33] If railroads were thus provided with the most favored treatment available for violations under Subsection (b)(4), railroads would not only not be paying more than their fair share of the State's tax burden, they would, at least in exemption cases, be paying no tax at all. Nothing in the statute supports a conclusion that the States are required to provide more favorable tax treatment to railroad property than is afforded to the general mass of other property in the State.

We do not, however, mean to suggest that a remedy that enjoins collection of the entire tax is never warranted. Such a remedy may be appropriate when the State's tax is drawn so narrowly that it is imposed only on rail carriers. See, *e.g.*, *Burlington Northern R.R.* v. *City of Superior*, 932 F.2d at 1188.

The breadth of the court's remedy also conflicts with the more tailored remedies provided under Subsections (b)(1) through (b)(3). In cases involving these subsections, courts have not afforded railroads the same treatment as taxpayers holding property with the lowest assessment ratio or tax rate. Instead, they have required the assessment ratio or tax rate for railroad property to be adjusted to equal that applicable to the general mass of commercial and industrial property. See, *e.g.*, *Clinchfield R.R.* v. *Lynch*, 784 F.2d at 550-551. When more than one tax rate is applicable to various classes of property, the States are enjoined to tax railroad property at a rate reflecting the weighted average of the various rates, not at the most favorable rate. *General American Transportation Corp.* v. *Kentucky*, 791 F.2d at 42, *ACF Industries, Inc.* v. *Arizona*, 714 F.2d 93, 95 (9th Cir. 1983); *Trailer Train Co.* v. *State Board of Equalization*, 697 F.2d at 867-868.

There is no basis for a broader remedy under Subsection (b)(4). An ad valorem property tax that violates the equal assessment or tax rate requirements of Subsections (b)(1) through (b)(3) may also be found (and, indeed, under the court of appeals' approach would necessarily be found) to result in "discrimination" under Subsection (b)(4). The remedy provided for the same violation under the several subsections should not differ.

The proper remedy under this statute is one that places the rail carrier in a position that would not constitute a violation of the Act. Thus, if a State's exemptions of 25% of non-railroad property lack justification and therefore violate Subsection (b)(4), the appropriate remedy is to exempt 25% of railroad property from tax—not to exempt all railroad property. No further remedy is "necessary" or authorized by the statute.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings consistent with the Court's opinion in this case.

Respectfully submitted.

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JULY 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60319